

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants	: Jahn and Kang)	
)	
Serial No.	: 10/538,434)	Examiner:
)	Li Zheng
Cnfrm. No.	: 2309)	
)	Art Unit:
Filed	: December 17, 2003)	1638
)	
For	: RECESSIVE PLANT VIRAL RESISTANCE)	
	RESULTS FROM MUTATIONS IN)	
	TRANSLATION INITIATION FACTOR eIF4E)	

APPLICATION FOR PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. § 1.705(b)

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Applicants hereby request reconsideration of the Patent Term Adjustment (“PTA”) accorded the instant application. Reconsideration of the final PTA calculation to increase total PTA from **333 days to 855 days plus the number of days from the payment of the issue fee to issuance of the instant application as a patent** is respectfully requested.

U.S. Patent and Trademark Office (“PTO”) Delay Under 35 U.S.C. § 154(b)(1)(A) (“A Delay”)

A first PTO action was due on or before September 30, 2007 (the date that is fourteen months from July 31, 2006, which is the date on which the application fulfilled the requirements of 35 U.S.C. § 371. *See* 35 U.S.C. § 154(b)(1)(A)(i); 37 C.F.R. § 1.702(a)(1) and 1.703(a)(1). The PTO mailed a restriction requirement on November 28, 2008, thereby accruing a PTO delay of **425 days**. Applicants do not dispute the calculation of this delay.

PTO Delay Under 35 U.S.C. § 154(b)(1)(B) (“B Delay”)

Under 35 U.S.C. § 154(b)(1)(B) and 37 C.F.R. §§ 1.702(b) and 1.703(b), the issue of a patent from the instant application was delayed due to the failure of the PTO to issue such a patent within 3 years after the filing date of the instant application. This period of B Delay should be

calculated as the number of days in the period beginning on the day after the date that is three years after the date on which the national stage commenced under 35 U.S.C. §§ 371(b) or (f), and ending on the date a patent is issued. 37 C.F.R. §§ 1.702(b) and 1.703(b). The current PTA calculation does not account for any B Delay by the PTO. Thus, Applicants contest the current PTA calculation.

The instant application is based on an international application that commenced the national stage under 35 U.S.C. § 371(b) (i.e., upon the expiration of the time limit under article 22(1) or 30 months from the priority date) on June 17, 2005, and three years from this date is June 17, 2008. The period of B Delay cannot yet be determined, because a patent based on the instant application has not yet issued. However, the period must be at least from June 18, 2008, to the payment of the issue fee (May 5, 2010), which is **686 days, plus the period from the date of payment of the issue fee to the date a patent is issued based on the instant application less any period of overlap between A Delay and B Delay.**

Overlap

Under 35 U.S.C. § 154 (b)(2)(A), 37 C.F.R. § 1.703(f), and the recent decision of *Wyeth v. Kappos*, 93 U.S.P.Q.2d 1257 (Fed. Cir. 2010), the period of adjustment attributable to the delay of the PTO is only totaled to the extent that the periods of A Delay and B Delay do not overlap *on the same calendar day*. In this case there is a period of overlap on the same calendar days between these two periods of PTO delay. Thus, because the period of A Delay of 425 days (which is July 31, 2006, to November 28, 2008) overlaps on the same calendar days (i.e., June 18, 2008, to November 28, 2008) with the B Delay (which is June 18, 2008, to the date of issue), **the total overlap of A Delay and B Delay is 164 days.**

Applicant Delay Under 37 C.F.R. § 1.704

A response to the April 14, 2009, non-final rejection was due on or before July 14, 2009. *See* 37 C.F.R. § 1.704(b). Applicants filed a response on October 14, 2009, thereby accruing an Applicant delay of **92 days** for failure to engage in reasonable efforts to conclude processing or examination under 37 C.F.R. § 1.704(b). Applicants do not dispute the calculation of this delay.

Terminal Disclaimer

The instant application is not subject to a terminal disclaimer.

Conclusion

In view of all the foregoing, Applicants submit that the current PTA calculation of 333 days is incorrect. Applicants respectfully request reconsideration of the total PTA, to be increased from **333 days to 855 days plus the number of days from the payment of the issue fee to issuance of the instant application as a patent.** The PTA should be calculated as follows:

1. Total PTO Delay should be calculated as 947 days plus the period from the payment of the issue fee to the date a patent is issued based on the instant application (*i.e.*, the sum of 425 days of A Delay and 686 days plus the period from the payment of the issue fee to the date a patent is issued based on the instant application of B Delay and less the 164 days of overlap between A Delay and B Delay).
2. Total Applicant delay should be calculated as 92 days.
3. Total PTA should be calculated as 855 days plus the period from the payment of the issue fee to the date a patent is issued based on the instant application.

Please apply the fee required under 37 C.F.R. §1.18(e) and any other required charges or credits to Deposit Account No. 14-1138.

Respectfully submitted,



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Date: May 5, 2010

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